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No. 90-1849

Supreme Court, U.S.
FILED
JUN 26 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1990

NORRIS McMACKIN, WARDEN,

Petitioner,

v.

DARYL L. HART,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF RESPONDENT IN OPPOSITION

J. Boyd Binning
(Counsel of Record)
592 S. Third Street
Columbus, Ohio 43215
(614) 224-1979
Reg. No. 0015939

Counsel for Respondent.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether, as represented by Petitioner, the Federal Circuit Court did disregard express factual findings arising out of a full state court evidentiary hearing which may have been supported by the record.

PARTIES

A complete list of all parties is included in the Petition for Writ of Certiorari.

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JURISDICTION

Respondent agrees that jurisdiction would be conferred pursuant to 28 U.S.C. §1254(1). However, for the reasons set forth below, Respondent respectfully requests this Honorable Court to decline issuance of a writ of certiorari in this matter.

STATEMENT OF THE CASE

Respondent accepts the statement of the case related to the Petition only regarding the history of this case.

At the time respondent originally entered his pleas of no contest, the most critical portion of the negotiated agreement was that respondent would receive a maximum term of fifteen (15) years incarceration and the harm specifications as to various counts of rape would be dismissed. (Evidentiary Tr. 8, 21, 40-41, 46-47, 127-128).

Prior to entering pleas of no contest the respondent had numerous conversations with both of his attorneys. Negotiations centered around the actual length of time the respondent would be incarcerated and away from his family.

There were several conversations between the trial court judge, respondent's attorneys and the prosecuting attorney. These conversations were recorded by one of respondent's attorneys and repeated to the respondent. (Evidentiary Tr. 46-47, 78-80, 88).

Respondent's attorney, Raymond Runner, specifically informed respondent that he would serve a maximum term of incarceration of fifteen (15) years. (Evidentiary Tr.

144, 149, 153, 158-159, 162, 166). Co-counsel for the respondent also informed him that the maximum sentence of incarceration would be fifteen years. (Evidentiary Tr. 20, 42-44, 53, 77, 80, 84, 96-97).

Respondent did not enter pleas of no contest until he was repeatedly assured by his counsel, and later the trial court judge, that he would be incarcerated for a maximum period of fifteen (15) years. (Evidentiary Tr. 20, 128, 154). The respondents concern regarding trial publicity was far outweighed by the most fundamental and crucial fact to be considered, the length of incarceration. The record is clear that respondent's ultimate motivating factor in entering his pleas was the period of time he would be separated from his family. (Evidentiary Tr. 54-55).

On May 29, 1991, the respondent was re-sentenced to a term of eight (8) to fifteen (15) years in the Lucas County Court of Common Pleas. This sentence conformed with the instructions of the United States Sixth Circuit Court of Appeals and their decision rendered March 5, 1991. Petitioner, with complete knowledge of what occurred in the Lucas County Court of Common Pleas, thereafter, on the same day, posted their petition.

Respondent's sentence on May 29, 1990, in original case numbers CR85-6605 and CR85-6916, was predicated upon a finding of guilty of attempted rape, and not rape, as was the finding in the original case. Thereafter, respondent was ordered to serve multiple concurrent sentences of eight (8) to twenty-five (25) years incarceration. Once the new findings occurred, and the sentence imposed, the issue raised in petitioner's Petition became moot.

SUMMARY OF ARGUMENT

Federal courts are required to give deference to factual determinations made by state courts so long as the state court record adequately supports said determinations. However, the federal courts are not required to agree with state court decisions which are wholly unsupported by the record. The decision rendered by the Sixth Circuit Court of Appeals correctly considered the record of the state courts and determined that no one understood the actual sentence to be imposed upon respondent, thus respondent's plea could not be of a voluntary nature.

ARGUMENT

The Sixth Circuit Court of Appeals gave deference to the state court record as is required by *Sumner v. Mata*, 449 U.S. 539 (1981); *Hart v. Marion, et al.*, 927 F. 2d 256 (6th Cir. 1991). Thereafter, the Court of Appeals correctly considered the record as a whole, giving deference to the state court's decision, pursuant to 28 U.S.C. §2254(d)(8).

Respondent's counsel, the prosecuting attorney, and the trial judge repeatedly informed the respondent that he would serve a maximum term of incarceration and then be released. A review of the record, by the Sixth Circuit Court of Appeals, clearly demonstrated that no one apparently understood the statutory sentencing provisions. Thus, the respondent could not be expected to understand the sentencing provisions and voluntarily enter pleas of no contest.

The record could not be any more concise regarding the misunderstanding which occurred where the trial judge twice informed the respondent, incorrectly, as to the maximum sentence to be imposed. (Evidentiary Tr. 99-101). The Appellate Court correctly determined, based upon a review of the whole record, that, in essence, the respondent could not have understood the impact of the maximum sentence being imposed if the trial court did not understand the maximum sentence to be imposed.

Petitioner cites *Nichols v. Perini*, 818 F. 2d 554 (6th Cir. 1987) for the apparent proposition that the Sixth Circuit, in the present case, issued a contrary decision based upon an identical set of circumstances. Such a proposition is incorrect and a distortion of the facts presented in *Nichols*, supra. In *Nichols*, supra, the petitioner never raised any issue contained in 28 U.S.C. §2254(d). Thus, the Sixth Circuit correctly deferred to the state court record.

The petitioner is, in reality, arguing that state court decisions, subsequent to the creation of a record, must be upheld by the federal courts regardless of the absurdity of the state court decision. This argument must fail in view of the federal court's right to review the whole record pursuant to 28 U.S.C. §2254(d). The record, in the present instance, is resplendent with evidence that not one of the parties involved understood the maximum sentencing provisions which were being imposed.

Petitioner is additionally now attempting to raise an issue which is moot. Petitioner knew the parties agreed to a re-sentencing pursuant to the decision of the Sixth Circuit. Petitioner then mailed this Petition once the re-

sentencing occurred on May 29, 1991. For this reason alone, the Petition should be dismissed.

CONCLUSION

Respondent respectfully requests this Court to decline issuance of a writ of certiorari in this case.

Respectfully submitted,

J. BOYD BINNING
(Counsel of Record)
592 S. Third Street
Columbus, Ohio 43215
(614) 224-1979
Reg. No. 0015939

Attorney for Respondent